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No. 05-1386

IN THE
SUPREME COURT OF THE UNITED STATES

KATHLEEN SEMIEN,
Petitioner,

v.

LIFE INSURANCE COMPANY OF NORTH AMERICA, a CIGNA COMPANY, and BP LONG TERM DISABILITY (LTD) PLAN,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF *AMICUS CURIAE* OF AARP IN SUPPORT OF PETITIONER

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MOTION OF AARP FOR LEAVE TO FILE A BRIEF *AMICUS CURIAE*

AARP moves for leave to file the accompanying brief *amicus curiae* in support of the Petitioner Kathleen Semien, whose case is before the Court on a Petition for a Writ of Certiorari from the judgment and opinion of the United States Court of Appeals for the Seventh Circuit.

Pursuant to Supreme Court Rule 37.2(b), through counsel *amicus* sought the consents of the parties to the filing of this brief. Counsel for the Petitioner gave consent, but counsel for the Respondent withheld consent.

INTEREST OF *AMICUS CURIAE*

AARP is a nonpartisan, nonprofit organization with more than 36 million members age 50 or older, working or retired, that is dedicated to addressing the needs and interests of older Americans. Almost half of AARP's members are working. Many of the members are participants in health care plans, pension plans, short and long term disability plans and other employee benefit plans covered by the Employee Retirement Income Security Act (ERISA), 29 U.S.C. § 1001 *et seq*. These AARP members, as well as other older Americans, depend on their ERISA employee benefit plans and the benefits the plans confer for their economic security throughout the course of their active work years and in retirement.

As of the end of U.S. government fiscal year 2005, ERISA plans covered 150 million workers and their dependents. Pension plans alone included assets of more than $4 trillion, and constituted the single largest pool of capital in the United States. U.S. Dep't of Labor, Employee Benefits Security Admin., http://www.dol.gov/ebsa.

It is important to AARP members and other employee benefit plan participants to be able to rely upon the benefits conferred by their respective plans and to be able to count on fair and equitable processing of claims for benefits under their respective benefit plans. Critical also is the means for plan

participants to have legal recourse to enforce their rights to benefits in circumstances of unjust benefit denials. These participants have a significant interest in ensuring that the instrumentalities of the courts are available to them in legal proceedings brought by them to enforce their rights. ERISA § 502(a)(1)(B), 29 U.S.C. § 1132(a)(1)(B); *cf. Mass. Mutual Life Ins. Co. v. Russell*, 473 U.S. 134, 144 (1985) (ERISA authorizes a civil action to challenge a denial of benefits). These participants also have obvious and substantial interests in ensuring that plenary court procedural processes are available to give meaning to their substantive rights to challenge disputed benefit denials. Finally, because the Department of Labor consistently has had inadequate resources to police the private system of benefit administration, plan participants have an interest in ensuring that the legal rights granted to them by ERISA legislation remain undiminished by erroneous court decisions. *See, e.g.*, PENSION & WELFARE BENEFITS ADMIN. – OPPORTUNITIES EXIST FOR IMPROVING MGMT. OF ENFORCEMENT PROGRAM, GAO-02-232, at 2-3 (GAO, March 2002); U.S. Department of Labor, PWBA TASK FORCE ON ASSISTANCE TO THE PUBLIC, 1992.

AARP thus advocates on behalf of individuals throughout the country to protect the rights of participants in private, employer-sponsored employee benefit plans covered by ERISA, 29 U.S.C. § 1001 *et seq.* As part of the Association's advocacy efforts to ensure, to the greatest extent possible, that participants and beneficiaries receive the benefit of ERISA's protections, AARP has participated as *amicus curiae*, in numerous cases involving fiduciary duties and remedies under ERISA. *See, e.g., Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204 (2002); *Harris Trust & Sav. Bank v. Salomon Smith Barney Inc.*, 530 U.S. 238 (2000); *Mertens v. Hewitt Assocs.*, 508 U.S. 248 (1993); *Varity Corp. v. Howe*, 516 U.S. 489 (1996); *Harley v. 3M*, 284 F.3d 901, (8th Cir.), *cert. denied*, 537 U.S. 1106 (2003).

The resolution of the issue before the Court will have a direct and vital bearing on the ability of employee benefit plan participants to exercise their rights to challenge benefit denials by employer-sponsored plans and thereby to protect their own

economic well-being and that of their families. In light of the significance of the issue presented by this case, *amicus curiae* respectfully submits this brief to facilitate a full consideration by the Court of the Petition.

REASONS FOR GRANTING THE MOTION

In addition to the conflict between the Seventh Circuit and the other circuits on the question presented by Petitioner, a Writ of Certiorari is appropriate because the Seventh Circuit decision seriously undermines the rights of all participants in employer-sponsored benefit plans of all types to mount a meaningful challenge to benefit denials by insurance carriers who act both as benefit plan administrator and funding source. If the Court does not grant the Petition for a Writ of Certiorari, the Seventh Circuit's holding that participants who challenge the benefit eligibility determination of an arguably conflicted plan fiduciary have limited rights to discovery. Not only will it constitute a radical departure from the language and intent of the ERISA statute, it will also undermine the carefully integrated civil enforcement provisions of the Act and create a virtual void in the statute's remedial structure insofar as individual participants are concerned. With this critical curtailment of ERISA's express remedies, the financial security of millions of participants in employer-sponsored plans is thrown into jeopardy due to their inability to police and protect their rights in their plan benefits.

The Seventh Circuit's decision is far-reaching in its impact on all participants of private employer-sponsored benefit plans not only as to disability insurance such as is involved in Ms. Semien's claim, but also as to health insurance, life insurance, severance benefits, pension benefits, etc. This case presents an opportunity to clarify and reinforce the role and powers of the federal courts under ERISA when participants challenge benefit denials by conflicted plan administrators.

June 2, 2006

Respectfully submitted,

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TABLE OF CONTENTS

Page

MOTION OF AARP FOR LEAVE TO FILE A BRIEF *AMICUS CURIAE* M-1

INTEREST OF *AMICUS CURIAE* M-1

REASONS FOR GRANTING THE MOTION M-3

TABLE OF AUTHORITIES iii

SUMMARY OF ARGUMENT 2

ARGUMENT 2

I. THE COURT'S DECISION IN *FIRESTONE TIRE & RUBBER CO. v. BRUCH* HAS SPAWNED A HOST OF DISTURBING HOLDINGS OVER THE ROLE OF THE FEDERAL COURTS IN CHALLENGES UNDER ERISA § 502(a)(1)(B) 2

II. ERISA'S GRANT TO PLAN PARTICIPANTS OF CIVIL ENFORCEMENT RIGHTS OF ACTION IS A FUNDAMENTAL ASPECT OF THE STATUTE'S SCHEME FOR PROTECTION OF EMPLOYEE BENEFITS 6

A. Because ERISA § 502(a)(1)(B) Directs That Participants May Bring a Civil Action To Recover Benefits Due or to Enforce Rights Under the Terms of a Plan, Participants Must Have Plenary Access to Discovery Tools .. 6

B. Case Law Demonstrates That Subjecting Insurers' Eligibility Determinations To Careful Scrutiny Promotes More Equitable Outcomes In ERISA Benefit Litigation 7

C. ERISA's Civil Enforcement Provisions Prescribe No Limitation on the Application of the Rules of Civil Procedure to the Rights of Participants to Prosecute Civil Actions to Enforce Plan Rights 9

D. The Seventh Circuit's Relegation of the Courts to Mere Review of ERISA Benefit Denial Decisions is an Abdication of the Role Assigned to the Courts by Congress Under ERISA to Preside Over § 502(a)(1)(B) Benefit Claims 9

CONCLUSION 11

TABLE OF AUTHORITIES

CASES

Brown v. Blue Cross & Blue Shield, Inc.,
898 F.2d 1556 (11th Cir. 1990), *cert. denied*,
498 U.S. 1040 (1991) 3

Buce v. Allianz Life Ins. Co.,
247 F.3d 1133 (11th Cir. 2001) *cert. denied*,
534 U.S. 1065 (2001) 4

Bynum v. CIGNA Healthcare,
287 F.3d 305 (4th Cir. 2002) 4

Dandurand v. Unum Life Ins. Co.,
284 F.3d 331 (1st Cir. 2002) 7

Darland v. Fortis Benefits Ins. Co.,
317 F.3d 516 (6th Cir. 2003) 4

Firestone Tire & Rubber Co. v. Bruch,
489 U.S. 101 (1989) ..... *passim*

Great-West Life & Annuity Ins. Co. v. Knudson,
534 U.S. 204 (2002) M-2, 9

Harley v. 3M, 284 F.3d 901 (8th Cir. 2002)
cert. denied, 537 U.S. 1106 (2003) M-2

Harris Trust & Sav. Bank v. Salomon Smith Barney Inc.,
530 U.S. 238 (2000) M-2, 9

Lain v. Unum Life Ins. Co.,
279 F.3d 337, 347 (5th Cir. 2002) 7

Mass. Mutual Life Ins. Co. v. Russell,
473 U.S. 134 (1985) 9

Mertens v. Hewitt Assocs., 508 U.S. 248 (1993) M-2, 9

Moon v. Unum Provident Corp.,
405 F.3d 373 (6th Cir. 2005) 7

Pegram v. Herdrich, 530 U.S. 211 (2000) 5

Pinto v. Reliance Standard Life Ins. Co.,
214 F.3d 377 (3d Cir. 2000) 4

Pitman v. Blue Cross & Blue Shield of Okla.,
217 F.3d 1291 (10th Cir. 2000) 4, 5

Radford Trust v. First Unum Life Ins. Co.,
321 F.Supp. 2d 226, (D. Mass. 2004) 8

Rush Prudential HMO, Inc. v. Moran,
536 U.S. 355 (2002) 4

Schatz v. Mutual of Omaha Ins. Co.,
220 F.3d 944 (8th Cir. 2000) 4

Semien v. Life Insurance Co. of North America,
436 F.3d 805 (7th Cir. 2006) ..... *passim*

Shaw v. Delta Air Lines, Inc.,
463 U.S. 85 (1983) 6

Stup v. Unum Life Ins. Co.,
390 F.3d 301 (4th Cir. 2004) 7

Varity Corp. v. Howe,
516 U.S. 489 (1996) M-2, 10

Watson v. Unum/Provident Corp.,
185 F.Supp. 2d 579 (D.Md. 2002) 7

Wilkins v. Baptist Healthcare Sys., Inc.,
150 F.3d 609, 619 (6th Cir. 1998) 10

STATUTES

Employee Retirement Income Security Act (ERISA), 29 U.S.C. 1002(21)(A)(2005) 12

ERISA § 404(a)(1)(A), 29 U.S.C.§ 1104 (a)(1)(A) 11
ERISA § 404(a)(1)(A), 29 U.S.C. § 1104 (a)(1)(D) 11
ERISA § 502(a)(1)(B), 29 U.S.C. § 1132(a)(1)(B) .. *passim*

MISCELLANEOUS

Kathryn J. Kennedy, *Judicial Standard of Review in ERISA Benefit Claim Cases*, 50 AM. U.L.REV. 1083, (2004) (2d ed. Rev. 1980) 10

PENSION & WELFARE BENEFITS ADMIN. OPPORTUNITIES EXIST FOR IMPROVING MGNT. OF ENFORCEMENT PROGRAM, GAO-02-232 (March 2002) M-2

REPORT OF THE TARGETED MULTISTATE MARKET CONDUCT EXAMINATION FOR MAINE BUREAU OF INSURANCE, MASS. DIV. OF INS., TENN. DEP'T OF COMMERCE AND INS. & FORTY-NINE PARTICIPATING JURISDICTIONS, available at http://www.maine.gov/pfr/ins/Unum_Multistate_ExamReport.htm (Feb. 29, 2004) 8

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INTEREST OF *AMICUS CURIAE*[2/]

[1/] No counsel for any party authored any portion of this brief. No person other than *amicus curiae*, its members, or its counsel made a monetary contribution to the preparation and submission of this brief.

[2/] *Amicus Curiae* has described its interest in the accompanying Motion of AARP for Leave to File a Brief *Amicus Curiae* which precedes this Brief, and does not repeat the same in this section of the Brief.

SUMMARY OF ARGUMENT

Firestone Tire & Rubber Co. v. Bruch has led a number of courts to limit the scope of review in ERISA challenges to benefit denials by adminisrator/insurers under ERISA § 502(a)(1)(B). In cases where the court reviews the eligibility determination of an insurance company under a deferential standard, plenary rights to exercise discovery to investigate the insurer's potential conflicts of interest and procedures for claim processing are critical to ERISA's civil enforcement provisions.

Absent claimants having plenary discovery rights in ERISA benefit litigation, the potential for abuse and overreaching by insurers is substantial. It is the office of the federal courts to preside vigilantly over the rights of ERISA plan participants and beneficiaries.

ARGUMENT

I. THE COURT'S DECISION IN *FIRESTONE TIRE & RUBBER CO. v. BRUCH* HAS SPAWNED A HOST OF DISTURBING HOLDINGS OVER THE ROLE OF THE FEDERAL COURTS IN CHALLENGES UNDER ERISA § 502(a)(1)(B).

In *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101 (1989), the Court unambiguously held that *de novo* is the presumptive standard for judicial review of ERISA benefit denials. That approach, which prescribes no deference to the prior determination of an ERISA plan administrator and the fact that the decision maker as to the employee's eligibility for benefits may be the very insurance company that will be obligated to pay the benefits, is of legal consequence only in that it sets the stage for civil enforcement proceedings initiated by the plan participant to challenge the company's denial under ERISA § 502(a)(1)(B), 29 U.S.C. § 1132 (a)(1)(B). Under *de novo* review, ultimately the court's own analysis of the record will prevail. Insofar as the judicial handling of the matter is concerned, it can be said that the holding of *Firestone* is the

presumption that the parties contend on a level playing field. *Firestone* did not stop there, however.

In the course of its *Firestone* analysis, the Court also commented in passing that where a plan gives the administrator or fiduciary discretionary authority to determine eligibility for benefits or to interpret the terms of the plan, then the deferential "arbitrary and capricious" standard is used. That statement in *Firestone* was qualified by the caveat that "if a benefit plan gives discretion to an administrator or fiduciary who is operating under a conflict of interest, that conflict must be weighed as a 'facto[r] in determining whether there is an abuse of discretion.'" *Id.* (quoting Restatement (Second) of Trusts §187, cmt. d (1959)) (alteration in original). This *Firestone* tangent has become the point of departure for many federal trial and lower appellate courts, post-*Firestone*, to continue to entertain the deferential, "arbitrary and capricious" or "abuse of discretion" standard of review in proceedings under ERISA § 502(a)(1)(B), 29 U.S.C. § 1132 (a)(1)(B), notwithstanding respectable and well articulated skepticism about the appropriateness of doing so. *But see Varity Corp. v. Howe*, 516 U.S. 489, 497 (recognizing that "trust law does not tell the entire story," the majority referenced ERISA's legislative history to caution that despite the trust-like fiduciary standards ERISA parallels, it was Congress' intent that courts interpret ERISA's fiduciary standards "bearing in mind the special nature and purpose of employee benefit plans"). The deferential standard had prevailed in challenges to benefit denials prior to the passage of ERISA, and courts were reluctant to depart from it. The pivotal point of controversy in *Firestone* is the Court's mechanical resort to trust law as the presumed source from which a standard may be derived for the review of claims under § 502(a)(1)(B), 29 U.S.C. § 1132(a)(1)(B), and the persistent application by the lower courts of the deferential standard on the authority of *Firestone*, particularly in the context of employee benefit plans that are funded by insurance.[3/]

[3/] Although *Firestone* has generally been recognized as the controlling decision in determining the standard of review in all ERISA cases, as the Eleventh Circuit and others have observed, whether the trust law principles

As a review of the ERISA decisions on statutory challenges to benefit denials will demonstrate, a substantial number of the reported cases involve an employee's filing of a civil action seeking to enforce a claim to a plan benefit in circumstances in which the pre-litigation determination of ineligibility was made by an insurance company which acted both as plan administrator and insurer, i.e., funding source for the benefit. As can be seen from the discussion that follows, the Court's reference in *Firestone* to trust law principles was and remains ill-suited to the task of resolving disputes under ERISA § 502(a)(1)(B) between benefit claimants and insurance companies who act in that dual role.[4/] The difficulty arises on account of the practice that has evolved in the courts in the name of deference for the court to act as a reviewing body, rather than as a tribunal vested with the power and

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relied upon in *Firestone*, which involved an employer-funded plan, have any application in the context of an insurance-funded plan where the insurer doubles as the plan administrator, is open to serious question. *See Brown v. Blue Cross & Blue Shield*, 898 F. 2d 1556, 1563 n.6 (11th Cir. 1990); ("Strong language endorses the right of the parties to contract for a standard of review, but that right is premised on assumptions regarding trust law that do not apply to insurance policy plans.") In *Firestone*, the Court withheld opinion on this issue. 489 U.S. 101, 115 ("Because we do not rest our decision on the concern for impartiality that guided the Court of Appeals, we need not distinguish between types of plans or focus on the motivations of plan administrators and fiduciaries.") (internal citation omitted).

[4/] *Darland v. Fortis Benefits Ins. Co.*, 317 F.3d 516, 527-28 (6th Cir. 2003) (noting that apparent conflict of interest should have been taken into account); *Bynum v. CIGNA Healthcare*, 287 F.3d 305, 311-12 (4th Cir. 2002) (holding insurer has substantial conflict of interest in defining policy terms); *Buce v. Allianz Life Ins. Co.*, 247 F.3d 1133, 1141 (11th Cir. 2001) (holding insurer's dual role posed conflict of interest), *cert. denied*, 534 U.S. 1065 (2001); *Schatz v. Mutual of Omaha Ins. Co.*, 220 F.3d 944, 948-49 (8th Cir. 2000) (dual role raises rebuttable presumption of conflict); *Pitman v. Blue Cross & Blue Shield of Okla.*, 217 F.3d 1291, 1296 (10th Cir. 2000) (observing that when plan administrator and insurer are identical conflict may be manifest); *Pinto v. Reliance Standard Life Ins. Co.*, 214 F.3d 377, 378 (3rd Cir. 2000) (holding that where insurer fulfills dual role of plan administrator and plan funding source it generally acts under conflict).

responsibility to exercise judicial traits such as sound, independent, critical analysis on the record before the court. Indeed, in a vast number of cases involving a grant to the administrator/insurer of discretion to determine the benefit claimant's eligibility for the claimed benefit, the case decisions reveal "**a uniformly lenient regime of reviewing benefit determinations**," *Rush Prudential HMO, Inc. v. Moran*, 536 U.S. 355, 385 2002), contrary to ERISA's prescribed civil enforcement remedies.

If anything may be gleaned from the ERISA statute, its legislative history, and from the Court's ERISA decisions, surely it is beyond dispute that Congress never intended the courts to be a rubber stamp for the benefit eligibility determinations of insurers. Moreover, the Court has recognized the problem with a deferential standard of review in the case of administrator/insurers in the ERISA claims context. *Id.* at 384. By limiting the applicability of the Rules of Civil Procedure to benefit denial challenges under ERISA, the Seventh Circuit's *Semien* holding turns a deaf ear to the Court's acknowledgment of the problem.

Nor is the reach of the Seventh Circuit's holding limited to claimants for disability plan benefits. The principle enunciated by that court, *i.e.*, that the Article III powers of district courts in claims brought under ERISA § 502(a)(1)(B), 29 U.S.C. § 1132(a)(1)(B) are limited to reviewing the determination of a non-tribunal that has a financial interest in the outcome, has significant and far-reaching implications well beyond the disability benefit claim context. Under the Seventh Circuit's view limiting ERISA claimants' recourse to effectively challenge benefit denials, health insurers and life insurers, too, when they also act as plan administrators, may with virtual impunity decide claims based upon their self-interest, driven primarily by the profit motive, rather than by their statutory obligations to plan participants and beneficiaries to act solely in the best interests of plan participants. Indeed, the Court has noted the potential for conflict when an HMO makes decisions about appropriate treatment. *Pegram v. Herdrich*, 530 U.S. 211, 219-20 (2000). No less at risk of being denied their rights to vindicate serious breaches of fiduciary

duty on account of the *Semien* holding are participants in ESOP and other defined contribution plans that handle substantial sums of employees' own funds. In derogation of the congressional charge in ERISA that courts are to safeguard the reasonable expectations of participants and beneficiaries in their employee benefit plans, by denying traditional discovery as a matter of right the Seventh Circuit withholds from ERISA litigants the procedural and substantive processes routinely available in civil actions.

II. ERISA'S GRANT TO PLAN PARTICIPANTS OF CIVIL ENFORCEMENT RIGHTS OF ACTION IS A FUNDAMENTAL ASPECT OF THE STATUTE'S SCHEME FOR PROTECTION OF EMPLOYEE BENEFITS.

A. Because ERISA § 502(a)(1)(B) Directs That A Participant May Bring a Civil Action to Recover Benefits Due or to Enforce Rights Under the Terms of a Plan, Participants Must Have Plenary Access to Discovery Tools.

Section 502(a)(1)(B) states that "[a] civil action may be brought by a participant or beneficiary to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan;" 29 U.S.C. § 1132(a)(1)(B). This provision is the manifestation of congressional action "to promote the interests of employees and their beneficiaries in employee benefit plans." *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 90 (1983). The Seventh Circuit's limitation of plan participants' rights to pursue ERISA enforcement actions by restricting their use of the discovery provisions of the Federal Rules of Civil Procedure to investigate the claims handling process in litigation between plan participants and administrator/insurers flies in the face of the congressional purpose of ERISA's civil enforcement provisions. Moreover, it makes a mockery of the Court's admonition in *Firestone* "that conflict must be weighed as a facto[r] in determining whether there is an abuse of discretion" in cases where a deferential

standard of review is employed. 489 U.S. at 115. The Seventh Circuit's holding makes it impossible for a litigant through discovery to develop the record on the administrator/insurer's conflict of interest and the critical details of the insurance company's management of the claim, thus insulating the insurer's eligibility determination from scrutiny and in equal measure robbing the claimant of the essence of his challenge under the ERISA statute and *Firestone*. The holding thus elevates to sacrosanct the self-serving benefit eligibility determinations of insurers and renders hollow ERISA's protections for plan participants. Neither Congress nor the Court has seen fit to so subordinate ERISA's mandate.

B. Case Law Demonstrates That Subjecting Insurers' Eligibility Determinations To Careful Scrutiny Promotes More Equitable Outcomes In ERISA Benefit Litigations.

Numerous are the published decisions that reveal overly aggressive claims denial practices by administrator/insurers in the ERISA benefit claims arena. One company has established notoriety in no fewer than four circuit courts of appeals and several district courts for its claim review procedures, highlighting such practices as "selective review of the administrative record;"[5] "lack of objectivity and abuse of discretion;"[6] reliance upon "ambiguous test results;"[7] irrational claims procedures;[8] conduct "border[ing] on outright fraud;"[9]. Chief Judge Young of the District Court of Massachusetts

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[5] *Moon v. Unum Provident Corp.*, 405 F.3d 373, 381 (6th Cir. 2005).

[6] *Lain v. Unum Life Ins. Co.*, 279 F.3d 337, 347 (5th Cir. 2002).

[7] *Stup v. Unum Life Ins. Co.*, 390 F.3d 301, 310 (4th Cir. 2004).

[8] *Dandurand v. Unum Life Ins. Co.*, 284 F.3d 331, 338 (1st Cir. 2002).

[9] *Watson v. Unum/Provident Corp.*, 185 F.Supp. 2d 579, 585 (D.Md. 2002).

observed that based on some twenty cases he had reviewed involving the same company there was "revealed a disturbing pattern of erroneous and arbitrary benefit denials, bad faith contract misinterpretations, and other unscrupulous tactics" that constituted conduct "entirely inconsistent with the company's public responsibilities and with its obligations under its [ERISA] Policy."[10/]

The same company's claims processing conduct attracted the attention of several state insurance regulators, who, acting in concert and individually, secured an agreement for the company to pay more than $20 million in fines and to reopen several years of adverse claims determinations.[11/] The patterns and practices discussed in the cases came to light in the course of proceedings brought by benefit claimants under ERISA § 502(a)(1)(B). Absent the litigants' rights to make necessary and relevant discovery under the Federal Rules of Civil Procedure, the company in question might well have been able to persist in its questionable conduct.

By restricting § 502(a)(1)(B) claimants' access to the discovery process in the district court, the Seventh Circuit's holding forecloses a participant's opportunity to develop the actuality and extent of a conflict of interest on the part of an ERISA administrator/insurer and the nature and extent of unlawful and objectionable claims processing procedures. Absent the opportunity to initiate and pursue discovery in the trial court on those critical factual issues, an ERISA litigant is effectively stripped of the right to enforce his/her benefit entitlement under the statute. The Circuit's holding promotes overreaching by administrator/insurers, and thus it is fatally

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[10/] *Radford Trust v. First Unum Life Ins. Co.*, 321 F.Supp. 2d 226, 247 n.20 (D. Mass. 2004).

[11/] *See Report of the Targeted Multistate Market Conduct Examination for Maine Bureau of Insurance, Mass. Div. Of Ins., Tenn. Dep't of Commerce and Ins. & Forty-Nine Participating Jurisdictions*, available at http://www.maine.gov/pfr/ins/Unum_Multistate_ExamReport.htm (Feb. 29, 2004).

flawed. Under the review regime envisioned by that court, the federal trial courts become mere shills for unscrupulous insurers to practice fraud upon highly vulnerable plan participants.

C. ERISA's Civil Enforcement Provisions Prescribe No Limitation on the Application of the Rules of Civil Procedure to the Rights of Participants to Prosecute Civil Actions to Enforce Plan Rights.

The Seventh Circuit's reading of limitations on discovery into ERISA's civil enforcement provisions is without precedent or statutory warrant. When interpreting ERISA's carefully integrated civil enforcement provisions under § 502(a), the Court repeatedly has looked at the plain language of ERISA, the evident care with which the civil enforcement provisions were crafted, the structure of the statue, and the policies underlying ERISA. Without exception, the Court has emphasized that the precise language of the statute must be followed. As the Court has been unwilling to read into ERISA implied claims or remedies, so has it also been unwilling to read limiting language into the statute. *See Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 209, 209; *Harris Trust & Sav. Bank v. Solomon Smith Barney, Inc.*, 530 U.S. 237, 247; *Varity Corp.*, 516 U.S. at 512; *Mertens v. Hewitt Assoc.*, 508 U.S. 248, 261-62 ; *Mass. Mutual Life Ins. Co. v. Russell*, 473 U.S. 134, 141-42. In contrast, the Seventh Circuit did exactly what the Court has been unwilling to do. The Seventh Circuit has done nothing less than to graft onto ERISA a limitation of the discovery provisions of the Federal Rules of Civil Procedure. On this ground alone, the Petition for a Writ of Certiorari should be granted.

D. The Seventh Circuit's Relegation of the Courts to Mere Review of ERISA Benefit Denial Decisions is an Abdication of the Role Assigned to the Courts by Congress under ERISA To Preside Over § 502(a)(1)(B) Benefit Claims.

In curtailing ERISA litigants' routine access to discovery procedures to enable a full inquiry into the nature and extent of an administrator/insurer's conflict of interest and details concerning insurers' claims processing practices, the Seventh Circuit disregards ERISA's command pertaining to fiduciary loyalty, which requires plan fiduciaries to act "solely in the interest of the participants and beneficiaries and . . . for the exclusive purpose of . . . providing benefits to participants and their beneficiaries . . ." ERISA § 29 U.S.C. 404(a)(1)(A), § 1104 (a)(1)(A).[12/]

Inasmuch as it is the avowed purpose of ERISA "'to promote the interests of employees and their beneficiaries in employee benefit plans' . . . and 'to protect contractually defined benefits, '" ERISA § 404(a)(1)(D), 29 U.S.C. § 1104(a)(1)(D) should be read to trump over plan terms conferring discretion that abridge ERISA's duty of loyalty in the context of the determination of eligibility for benefits. Thus, courts that confer presumptive rubber-stamp approval to benefit eligibility denials by self-serving administrator/insurers without permitting litigants the opportunity to conduct essential discovery give the insurers a free pass to shirk their ERISA mandated fiduciary duties. *See Wilkins v. Baptist Healthcare*

[12/] The importation from trust law of the duty of loyalty to ERISA in the context of applying the duty to insurers who double as plan administrators and also serve as funding source for plan benefits points up the difficulty inherent in *Firestone's* derivation of the standard of review from trust law. 29 U.S.C. 1002(21)(A)(2005) (ERISA defines "fiduciary" broadly as a person who exercises any discretionary authority with respect to management of a plan even if that person lacks the granting of discretion envisioned under trust law to justify an arbitrary and capricious deferential standard of review in the context of ERISA benefit denials); *see generally* Kathryn J. Kennedy, *Judicial Standard of Review in ERISA Benefit Claim Cases*, 50 AM. U.L.REV. 1083, 1105-6 (citing George Gleason Bogert & George Taylor Bogert, *The Law of Trusts and Trustees* 558, 560 (2d ed. Rev. 1980) (observing that trust law makes a distinction between a trustee's discretionary and non-discretionary authority in that if a trustee failed to carry out his duties, courts could apply de novo review in assessing the trustee's failure to perform).

Sys., Inc., 150 F.3d 609, 619 (6th Cir. 1998) (Gilman, J., concurring) (noting that a district court may allow discovery and hear evidence outside the administrative record if that evidence is offered in support of a procedural challenge to the administrator's decision, such as an alleged bias, in an ERISA benefit denial case). Inasmuch as the Seventh Circuit's *Semien* decision validates such passive judicial handling of ERISA claims under § 502(a)(1)(B), it facilitates an abdication by the courts of their congressionally assigned role to actively preside over ERISA benefit claims. The Court should grant the Petition for a Writ of Certiorari to curb that practice in the lower courts.

CONCLUSION

For the foregoing reasons, *Amicus Curiae* respectfully urges the Court to grant the Petition for a Writ of Certiorari.

June 2, 2006

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